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Nos. 91-617, 91-618, 91-619

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TONY AVIRGAN, *et al.*,
Petitioners,

v.

JOHN HULL, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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JOINT CONSOLIDATED BRIEF OF RESPONDENTS CALERO, CLINES, DELAMICO, GONZALEZ, HAKIM, HULL, MARTIN, McCOY, NUNEZ, OWEN, QUINTERO, SECORD, SHACKLEY, AND SINGLAUB IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

JACK MCKAY
(Counsel of Record)
JANE M. SULLIVAN
SHAW, PITTMAN, POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8439
Attorneys for Respondent Theodore G. Shackley

THOMAS HYLDEN
BAKER & HOSTETLER
Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1640
Attorney for Respondent Robert Owen

(Additional Attorneys Listed on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

THOMAS R. SPENCER
SAMUEL B. REINER, II
SPENCER & KLEIN, P.A.
801 Brickell Ave., Suite 1901
Miami, Florida 33131
(305) 374-7700
Attorneys for Respondent John K. Singlaub

MICHAEL W. BURNBAUM
4820 Southeast Financial Center
200 So. Biscayne Boulevard
Miami, Florida 33131
(305) 379-4050
Attorney for Respondent Rafael Quintero

THEODORE KLEIN
FINE, JACOBSON, SCHWARTZ, NASH, BLOCK & ENGLAND
100 S.E. 2d Street
Miami, Florida 33131
(305) 577-4050
Attorney for Respondents Ronald Martin, James McCoy and Mario Delamico

LUIS S. KONSKI
STEWART, DAMSKY, MARKUS & KONSKI
1395 Brickell Ave.
Third Floor
Miami, Florida 33131
(305) 358-7272
Attorney for Respondent Moises Nunez Ruiz

PAUL V. CASTELLITO
SHARP & LANKFORD
1785 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 745-1700
Attorney for Respondents Thomas Clines, Albert Hakim, Rafael Quintero and Richard Secord

EDWIN R. SMITH
1004 Hulman Building
Evansville, Indiana 47708
(812) 425-5137
Attorney for Respondent John Hull

J. MICHAEL FITZGERALD
FITZGERALD & PORTUONDO
2701 Museum Tower
150 West Flagler Street
Miami, Florida 33130
(305) 358-0737
Attorney for Respondent Adolfo Calero

H. JEFF CUTLER
DE LA CRUZ & CUTLER, P.A.
241 Sevilla Ave., Suite 805
Coral Gables, Florida 33134
(305) 446-0100
Attorney for Respondent Jorge Gonzalez

QUESTIONS PRESENTED

1. Whether the imposition of Rule 11 sanctions on Mr. Sheehan violated his Fifth and Sixth Amendment rights, where the district court found that the sanctioned attorney filed a complaint with no prospect of being able to prove his claims and made false representations to the court which were the basis on which two years of pretrial discovery proceeded.

2. Whether the Fifth Amendment's Due Process Clause required the district court to conduct an evidentiary hearing before imposing sanctions on Mr. Sheehan pursuant to the "bad-faith" exception of the American Rule, where the sanctions were based on the sanctioned attorney's own conflicting representations to the court and where, prior to imposition of the sanctions, the sanctioned attorney had received notice of the basis for the sanctions, submitted a written response of 40 pages, and never requested a hearing.

3. Whether the Fifth Amendment's Due Process Clause required the district court, when imposing sanctions on Mr. Sheehan pursuant to 28 U.S.C. § 1927 for unreasonably and vexatiously multiplying the proceedings, to make a specific finding of the proportion of the defendants' costs and attorneys' fees attributable to specific conduct, where the court found that the sanctioned attorney "must have known prior to suing that [he] had no competent evidence to substantiate the theories alleged" in the complaint and where his false representations to the court were the basis on which two years of pretrial discovery proceeded.

4. Whether there is a conflict between the district court's summary judgment and sanctions orders so that the entry of sanctions against Mr. Sheehan pursuant to Rule 11, 28 U.S.C. § 1927, and the "bad-faith" exception to the American Rule constitutes an abuse of discretion.

5. Whether the imposition of Rule 11 sanctions on the Christic Institute conflicts with this Court's decision in *Pavelic & LeFlore v. Marvel Entertainment Group* where the Christic Institute was a real party in interest in the litigation.

6. Whether the Christic Institute may be sanctioned under 28 U.S.C. § 1927.

7. Whether the Christic Institute may be sanctioned pursuant to the "bad-faith" exception to the American Rule.

8. Whether the Fifth Amendment's Due Process Clause required the district court to conduct an evidentiary hearing before imposing "bad-faith" sanctions on the Christic Institute where, prior to imposition of the sanctions, the sanctioned party had received notice of the basis for the sanctions, submitted a written response of 40 pages, and never requested a hearing.

9. Whether the district court abused its discretion when it imposed, pursuant to its inherent powers, "bad-faith" sanctions against plaintiffs Avirgan and Honey who "had every reason to know they stood no chance of proving" that the defendants caused their injuries and where they were "willful participants in [their attorney's] litigation strategy" and were paid for their participation in the litigation.

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RESPONSE TO PETITIONERS' STATEMENTS OF THE CASE

Respondents will not respond here in any length to the statements of the case contained in the petitions for writs of certiorari. We note that they are argumentative, inaccurate, and, for the most part, relevant only to the award of summary judgment—which is not

the subject of the certiorari petitions—and not to the award of sanctions. Additionally, petitioners' version of the facts was rejected by the Eleventh Circuit, which unanimously found that ample time and scope was granted to petitioners to obtain discovery in support of their allegations, and that the "evidence" produced by petitioners was insufficient to satisfy their burden in defeating respondents' properly supported summary judgment motions.

With respect to the facts material to the sanctions awards, petitioners fail to mention many of the key facts relied upon by the district court. In particular, petitioners fail to discuss the district court's findings regarding the false and misleading nature of the Sheehan Affidavit (R4.141), which contained a detailed exposition of the "knowledge" of petitioners at the time they filed their complaint (2SR2.1300, p. 7 of Sanctions Affidavit), and which was the basis for the two years of litigation that preceded the summary judgment awards. *Avirgan v. Hull*, 705 F. Supp. 1544, 1545 (S.D. Fla. 1989) (J. App. I, 32-A - 33-A). The Sheehan Affidavit, submitted in December 1987 to defeat a motion to dismiss, outlined the purported testimony of 79 alleged witnesses in support of the allegations of the Second Amended Complaint. Petitioners vigorously resisted disclosing the identity of those alleged witnesses, citing concerns for their security. When disclosure was finally completed, after a twelve-month procedural battle, it was learned that 11 of the 79 sources simply did not exist, 17 were dead or of unknown identity to petitioners, two were later admitted by petitioners to have provided no information set forth in the affidavit, and 10 denied having given petitioners the information attributed to them in the Sheehan Affidavit.[1] As the district court found,

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[1] (R4.141; R14.529; R15.556; R16.595 Ex. C; R17.646; R40E.1193.706, 712; R16.595 Ex. D-1, ¶ 10, D-7, D-11; R42E.1197.295-305; R18.656 Exs. 2, 4; R38.1218 Ex. F; R38.1218 Ex. G.)

> [t]he names and identities of approximately twenty of the seventy-nine witnesses were totally unknown to Mr. Sheehan or plaintiffs. Several of the disclosed witnesses later stated under oath that they did not know Mr. Sheehan, had never spoken to him, or flatly denied the statements he had attributed to them in his affidavit. The remaining witnesses did not furnish any statement that would be admissible.

705 F. Supp. at 1545.

The petitioners' statements of facts suffer not only from omissions of fact, but misstatements of the record. For example, Petitioner Sheehan refers to an indictment by the Costa Rican government as part of his "compelling pre-filing evidence." (Sheehan Pet. 7.) However, the alleged Costa Rican "indictment" was *not* part of the "pre-filing evidence," is not even part of the record in this case, and was rejected for filing by the Eleventh Circuit when petitioners sought to supplement the record with it. Likewise, nothing in the record supports Petitioner Sheehan's representation that he informed the district court of 49 exhibits and 58 witnesses on causation in the plaintiffs' pretrial stipulation. (Sheehan Pet. 11.) That document merely listed the names of over 2000 witnesses and thousands of exhibits with no indication of their relevance. (R.28.972.)

Other misstatements of fact and incomplete or misleading statements of the record in petitioners' briefs are discussed below in the contexts of the various arguments to which they are relevant.

SUMMARY OF ARGUMENT

The three petitions to which this joint consolidated opposition responds arise from unusual circumstances where a district court, having determined that the petitioners had concocted a lawsuit and kept it alive by direct misrepresentations to that court, imposed substantial sanctions because of the great harm and expense caused by the litigation. Those sanctions were unanimously affirmed by a panel of the Eleventh Circuit, and no judge of that court requested that the court be polled on the suggestion for rehearing *en banc*.

Petitioners now claim constitutional violations, a conflict among the circuits, and a conflict with recent opinions of this Court to justify the grant of certiorari. None exist. The sanctions were well supported by the deceptive conduct of the petitioners below and were entered after a more than adequate opportunity for petitioners to be heard. No conflict exists between the two circuit court decisions cited by petitioner Christic Institute. No conflict exists with decisions of this Court. The specific and unique facts of this case fully justified the sanctioning of the Christic Institute "law firm," its lead counsel Daniel Sheehan, and the plaintiffs Avirgan and Honey.

Reduced to their essence, the petitions ask this Court to engage in a detailed factual analysis and find an abuse of discretion by the district judge. Such a review would be directly contrary to this Court's recent holding that deference should be paid to the findings of the district judge who is familiar with the issues and the litigants and in the best position to determine whether and what sanctions should be imposed. Moreover, because of the peculiar nature of the facts giving rise to these sanctions, review by this Court would not establish a rule of law with significance beyond the parties to this litigation.

No factual, constitutional, or policy reason exists to grant the petitions for writs of certiorari to the Eleventh Circuit. The expense and disruption inflicted by these petitioners on the respondents should be brought to an end.

REASONS FOR DENYING THE WRITS

I. THE IMPOSITION OF RULE 11 SANCTIONS ON MR. SHEEHAN FOR FILING A GROUNDLESS SUIT AND FOR HIS MISREPRESENTATIONS IN SIGNED COURT PAPERS WAS WELL WITHIN THE DISTRICT COURT'S DISCRETION

Petitioner Sheehan argues in Point I of his petition that the district court violated his Fifth and Sixth Amendment rights not to be deprived of his property without due process of law when it imposed on him over $1,000,000 in Rule 11 sanctions. His tortured argument, even in its constitutional dressing,[2] asks only that this Court make a third review of the lengthy trial court proceedings and reverse the holdings of the district court and court of appeals that neither the complaint nor the Sheehan Affidavit was well grounded in fact at the time Mr. Sheehan signed them. Furthermore, Petitioner Sheehan misstates the basis on which the district court imposed Rule 11 sanctions, misapplies the *Celotex* and *Liberty Lobby* opinions, and misrepresents the facts in this case.

A. The Rule 11 Sanctions Imposed On Mr. Sheehan Were Based On Not Only Lack of Evidence But Also Misrepresentations To The District Court In And Involving His Affidavit

The district court imposed Rule 11 sanctions on Mr. Sheehan not only because he had "no evidence" to support his claim, as he suggests (Sheehan Pet. 20), but also because of his misrepresentations to the district court in and involving his affidavit. The district court found (1) that the Sheehan Affidavit outlined the purported testimony of 79 witnesses identified only by number, (2) that Mr. Sheehan had refused to disclose the identity of

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[2] Petitioner Sheehan claims violations of the Fifth and Sixth Amendments. However, the only arguable application of the Fifth Amendment is treated elsewhere in his petition—in his claims of denial of due process. The Sixth Amendment has never been held to have applicability to civil proceedings imposing Ruling 11 sanctions such as are involved here.

most of those witnesses for almost a year, citing concerns regarding the "security" of the witnesses, (3) that the reason for his refusal became apparent when final disclosure revealed that many of the so-called witnesses were totally unknown to Mr. Sheehan, had never spoken to him, or denied the information attributed to them, (4) that the Sheehan Affidavit had been the basis on which plaintiffs had been permitted to conduct two years of discovery, and (5) that Mr. Sheehan's refusal to disclose the identities of the witnesses prevented respondents from deposing the witnesses and delayed orderly discovery by defendants for many months. 705 F. Supp. at 1545 (J. App. I, 31-A). Thus, Petitioner Sheehan is clearly wrong in his contention that the Rule 11 sanctions were based only on the summary judgment findings that he had "no evidence" to support his claim. Indeed, elsewhere in his petition he recognizes this fact when he states: "petitioner's purported 'bad faith' was the basis of the entire sanction." (Sheehan Pet. 25.)

Based on this evidence of misrepresentation by Mr. Sheehan, the district court implicitly concluded, and the Eleventh Circuit agreed, that "Sheehan could not have reasonably believed at the time of the filing of the complaint and the signing of the affidavit that the complaint was well-grounded in fact," and that he therefore violated Rule 11. *Avirgan v. Hull*, 932 F.2d 1572, 1582 (11th Cir. 1991) (J. App. I, 21-A). For this Court now to sift through the voluminous record below, as requested by Mr. Sheehan, would eviscerate this Court's holding in *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2459 (1990), which mandates deference to the district court on factual and legal findings in Rule 11 matters.[3]

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[3] *Cooter & Gell* held that a district court's imposition of Rule 11 sanctions is reviewable only for abuse of discretion. "Familiar with the issues and the litigants, the district court is better situated than the court of appeals to marshal the pertinent facts and apply

B. The District Court's Summary Judgment Order Is Not An Issue Before This Court And, In Any Case, Is Correct

Even though Mr. Sheehan devotes five pages of his petition to an analysis of whether summary judgment was properly granted, he has not asked this Court to grant certiorari on this issue.[4] His sole reason for analyzing the district court's summary judgment findings is to attempt to show that they were procedurally defective under this Court's decision in *Celotex* and *Liberty Lobby* and thus that the Rule 11 sanctions, which he claims were based on the summary judgment findings, were also defective. As shown above, the Rule 11 sanctions were based not only on the summary judgment findings of "no evidence" but also on Mr. Sheehan's misrepresentations to the district court throughout the course of the district court proceedings. Thus, Mr. Sheehan's summary judgment analysis is irrelevant. It is also wrong.

The district court did not grant summary judgment on mere conclusory assertions that petitioners had no evidence, as Mr. Sheehan contends. (Sheehan Pet. 20.) Respondents amply demonstrated that petitioners had no admissible evidence showing that respondents had caused the La Penca bombing—a key element of plaintiffs' RICO claim.[5] For example, Respondent Shackley's third mo-

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the fact-dependent legal standard mandated by Rule 11." 110 S. Ct. at 2459.

[4] None of the other petitioners seek review of that part of the Eleventh Circuit's decision affirming the award of summary judgment. Accordingly, the summary judgment award is final and not subject to further review.

[5] Petitioner Sheehan does not contest that plaintiffs were required to prove, as an essential element of their RICO claim, that their injuries were proximately caused by the alleged Neutrality Act enterprise. 18 U.S.C. § 1964(c); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

tion for summary judgment was supported by the following documents:

1. A statement of material facts not in dispute, which was "deemed admitted" pursuant to Southern District of Florida Local Rule 10J because plaintiffs failed to file a statement in which those facts were controverted. (R16.595.)

2. Plaintiffs' response to Mr. Shackley's second production request in which plaintiffs stated that they had no documents relating to their allegations against Mr. Shackley. (R16.595, Ex. B.)

3. Plaintiffs' answers to Mr. Shackley's interrogatories, which likewise showed that plaintiffs had no evidence linking Mr. Shackley to the La Penca bombing. (R16.595, Ex. C.)

4. Eighteen affidavits from individuals whom plaintiffs had described as having knowledge to support the allegations against Mr. Shackley or individuals in a position to know of any involvement by Mr. Shackley in Contra-related activities.[6] The affidavits contained explicit denials of knowledge of Mr. Shackley's involvement in the activities that plaintiffs alleged. (R16.595, Ex. D.)

Respondent Owen's summary judgment papers provide another example of respondents' extensive showing that there was no genuine issue of material fact on the issue of causation. Mr. Owen submitted an affidavit in which he denied each allegation made in the complaint against him. In addition, his summary judgment papers exam-

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[6] These individuals were described in plaintiffs' interrogatories as "believed to have firsthand knowledge" that Mr. Shackley supplied arms to the Contras or received the proceeds of illegal sales (R16.595, Ex. C, Interr. 2), or to "have knowledge of facts" supporting the allegation that Mr. Shackley joined the "enterprise" in 1984 (*Id.*, Interr. 3), or were listed as primary sources in the Sheehan Affidavit (R4.141).

ined the evidence in the Sheehan Declaration of Counsel (R18.661), which plaintiffs admitted was the only evidence they had against him. That examination showed that the evidence in the declaration (a) failed to demonstrate that "Amac Galil" was the La Penca bomber or that "Galil," if he existed, was a member of the alleged enterprise, (b) was based upon information that was not admissible in a court of law, or (c) contained no allegations of wrongdoing, knowledge, or participation on the part of Mr. Owen. (R30.1012.) Other defendants submitted similarly extensive evidence showing that plaintiffs had no admissible evidence on the issue of causation. (*See, e.g.*, R27.936; R.31.1030.)

Thus, respondents' motions for summary judgment presented evidence that both negated the causation element and pointed out petitioners' failure to produce sufficient evidence to create a genuine issue of material fact as to causation. This shifted the burden to petitioners to establish with admissible evidence the existence of a genuine issue of material fact on causation. *Celotex v. Catrett*, 477 U.S. 317, 322, 327 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Petitioner Sheehan does not contend that petitioners produced admissible evidence on the issue of causation.

Because the entry of summary judgment was procedurally and substantively correct and because sanctions were not based on the summary judgment ruling, there is no foundation for Mr. Sheehan's convoluted argument that sanctions were defective because summary judgment was entered in violation of *Celotex*.

II. THE ENTRY OF SANCTIONS AGAINST MR. SHEEHAN COMPLIED FULLY WITH DUE PROCESS REQUIREMENTS

Petitioner Sheehan asks this Court to grant certiorari because "[t]his Court has not heretofore addressed the question of how much process is due to a respondent on a sanctions motion. An authoritative pronouncement by

this Court of the contours of that due process is necessary." (Sheehan Pet. 21.) The fact that a given question has not been resolved by the Supreme Court, however, has never been a recognized basis for the grant of certiorari. Furthermore, Petitioner Sheehan cites no conflicts with decisions of this Court or conflicts among the courts of appeals on this issue.[7] Finally, this argument has no merit.

A. Mr. Sheehan Waived An Evidentiary Hearing

There was no reason for the district court to hold an evidentiary hearing. None of the sanctioned parties requested a hearing on defendants' sanctions motions, as required by Southern District of Florida Local Rule 10.B.1,[8] and any right to a hearing was thus waived.[9] *See*

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[7] In fact, this Court recently denied certiorari, in another case where a Christic Institute attorney was sanctioned, on the issue of whether due process requires a hearing before the imposition of sanctions. *In re Kuntsler*, 111 S. Ct. 1607 (1991).

[8] Local Rule 10.B.1 provides in relevant part:

> A party who desires oral argument or a hearing of any motion *shall* request it in writing by separate request accompanying the motion or opposing memorandum. The request shall set forth in detail the reasons why a hearing is desired and would be helpful to the Court and shall estimate the time required for argument.

Fed. Local Ct. Rules, S.D. Fla., Rule 10.B.1 (emphasis added).

[9] This Court's decision in *Roadway Express v. Piper*, 447 U.S. 752 (1980), is not to the contrary. The issue of a hearing was not before the Court in that case because the district court had held a hearing and heard argument before entry of sanctions. *Id.* Moreover, while courts have cited *Roadway* for the proposition that due process requires an opportunity to be heard, it has never been held to mandate an evidentiary hearing on sanctions motions. *See, e.g., Media Duplication Services v. HDG Software*, 928 F.2d 1228, 1238 (1st Cir. 1991) (holding that "Rule 11 does not require a full hearing in every case" while noting that *Roadway* requires an opportunity for a "hearing on the record").

United States v. Nesglo, Inc., 744 F.2d 887, 890-91 (1st Cir. 1984) (where appellants failed to file an opposition to a sanctions motion and to request a hearing, their due process complaint was "entirely frivolous").

Moreover, all petitioners received notice of the possibility of sanctions and full opportunity to explain their conduct. The district court expressly warned the parties of the possibility of sanctions. Although the district court denied respondents' sanctions motions at that time, its October 5, 1987 order recited Rule 11 and warned petitioners that it might reconsider the motions:

> The Court, however, has the duty and, will not hesitate to impose such sanctions *if it becomes evident at some later point that such violations have occurred.* If the discovery process unveils sanctional [sic] abuses heretofore raised, the Court will reconsider those motions at that time.

(R.11.438) (emphasis supplied). In addition, respondents' motions for attorneys' fees and costs put all petitioners, including Mr. Sheehan, on notice of the amount and type of sanctions sought and of the legal and factual grounds for them. (*See, e.g.*, R37.1179; R38.1213.) Fair notice requires nothing more. *See, e.g., Donaldson v. Clark*, 819 F.2d 1551, 1559-60 (11th Cir. 1987) (*en banc*) (notice may be given by a party or the court orally or in written submissions).

The district court was more than solicitous in according petitioners an opportunity to be heard on respondents' motions for fees and costs. The district court several times (and twice *sua sponte*) extended the time for petitioners to file their oppositions to the motions for sanctions from July 25, 1988 through October 4, 1988. (R39.1267; 2SR1.1271; 2SR1.1272; 2SR1.1294.) The substantive opposition petitioners eventually filed was 40 pages long, with 12 pages devoted to a discussion of Rule 11, five pages to § 1927, and eight pages to the bad-faith exception to the American Rule. (2SR2.1300.) Thus, the

district court allowed petitioners, including Mr. Sheehan, more than ample opportunity to be heard on respondents' motions and made sure that they availed themselves of that opportunity.[10]

B. The District Court's Sanctions Orders Specified The Sanctioned Conduct And Sanctioning Authority

Petitioner Sheehan complains that the district court's bad-faith sanctions award failed to delineate the "conduct being sanctioned, the factual findings regarding each act, or the application of a particular sanction authority to the sanctioned acts." (Sheehan Pet. 25.) This contention ignores the district court's findings, the facts, and the law. The bad-faith sanctions were based on the groundless complaint, second amended complaint, and the nearly contemporaneous Sheehan Affidavit. 705 F. Supp. at 1545 (J. App. I, 31-A - 33-A); 125 F.R.D. at 190 (J. App. I, 51-A). The district court found that the allegations in the complaints "were based upon unsubstantiated rumor and speculation from unidentified sources with no first hand knowledge." 705 F. Supp. at 1545 (J. App. I, 33-A). It further found that Mr. Sheehan "must have known prior to suing that [he] had no competent evidence

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[10] Petitioner Sheehan contends that "the severity of the sanction and the subjective elements on which it was based rendered an oral hearing imperative." (Sheehan Pet. 23-24.) However, the fact that petitioners caused great harm to a large number of defendants should not give them additional procedural rights. Likewise, the bad-faith basis of the sanctions does not require a hearing. Chief Judge King, who presided over the entire course of the district court proceedings, based his bad-faith findings largely on Petitioner Sheehan's own conflicting representations to the court in his affidavit and proceedings related to it. Under these circumstances, an evidentiary hearing with cross-examination was unnecessary. *See Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986) (holding a hearing is unnecessary when "the judge's participation in the proceedings provide[s] him with full knowledge of the relevant facts").

to substantiate the theories alleged in their complaint." 705 F. Supp. at 1545 (J. App. I, 32-A). The district court also found that the Sheehan Affidavit was the cause of lengthy and costly battles, including a petition for writ of mandamus to the Eleventh Circuit, for disclosure of unidentified sources many of whom were later admitted to be dead, nonexistent, unknown, or unlocatable. 705 F. Supp. at 1545 (J. App. I, 32-A); (R14.529; R15.556; R17.646). It was also the basis on which two years of costly and unproductive discovery proceeded until the grant of summary judgment. 705 F. Supp. at 1545 (J. App. I, 32-A). Further, Mr. Sheehan used his false affidavit to support many subsequent filings. (*See, e.g.*, R7.280.2; R9.378.3-5; R9.379.3; R14.520.2; R17.635.9, 11.)

Thus, all of Mr. Sheehan's conduct throughout the litigation was sanctionable and was so found by the district court, which sanctioned Mr. Sheehan "coextensively" under Rule 11, § 1927, and the bad-faith exception to the American Rule. 705 F. Supp. at 1549, n.5. Under this Court's recent decision in *Chambers v. NASCO*, 111 S. Ct. 2123 (1991), it was unnecessary for the district court to parse through various sanctioning authorities before imposing bad-faith sanctions pursuant to its inherent power:

> In circumstances such as these in which all of a litigant's conduct is deemed sanctionable, requiring a court first to apply rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the rules themselves.

Id. at 2136.

Finally, Petitioner Sheehan contends that the district court's bad-faith findings against him are flawed because they do not include a "finding of actual knowledge or scienter." (Sheehan Pet. 25.) This argument is raised for the first time in the petition for certiorari. Moreover,

the record below amply supports a conclusion that Mr. Sheehan knew that representations in and regarding his affidavit were false. As discussed above, for example, Mr. Sheehan resisted disclosing the identities of his 66 unidentified sources in his affidavit, in part, on the ground that he feared for their safety. (*See, e.g.*, R10.388.5; R16.595 Ex. C.) As the author of his affidavit, however, he must have known that many of those sources whom he so fiercely protected from identification were dead, nonexistent, unknown, or unlocatable. In light of these objective record facts, which were observed by the district court, 705 F. Supp. at 1545 (J. App. I, 32-A), a specific finding of "scienter" was unnecessary.

III. THE DISTRICT COURT'S FINDINGS REGARDING THE IMPOSITION OF § 1927 SANCTIONS ON MR. SHEEHAN COMPLIED WITH DUE PROCESS REQUIREMENTS

Petitioner Sheehan asserts an additional due process argument in Point III of his petition regarding the imposition of § 1927 sanctions: that the district court's sanctions order "wholly fails to specify which 'excess' costs can be attributed to which alleged 'multiplication' of the proceedings." (Sheehan Pet. 27.) This claim has no merit.

The district court's sanctions orders specifically found that the "plaintiffs' attorneys" filed a suit "based upon unsubstantiated rumor and speculation from unidentified sources with no first hand knowledge" and that they "must have known prior to suing that they had no competent evidence to substantiate the theories alleged in their complaint." 705 F. Supp. at 1545 (J. App. I, 32-A, 33-A). Mr. Sheehan's resort to fabricated witnesses and testimony in his affidavit demonstrates the groundlessness of the complaint and second amended complaint, which were based on the evidence in his affidavit. The district court's order implicitly, though unmistakably, concluded that the entire course of proceedings—consisting largely of exten-

sive litigation over disclosure of witnesses [11] and massive, fruitless discovery until entry of summary judgment—was unjustified and should neither have been commenced nor pursued. All costs and fees incurred after the filing of the complaint were therefore "excess" and properly awarded under § 1927. *In re TCI, Ltd.*, 769 F.2d 441, 448 (7th Cir. 1985) (district court had authority under § 1927 "to award the fees incurred right from the beginning" of the case where the complaint was baseless); *cf. Braley v. Campbell*, 832 F.2d 1504, 1513 (10th Cir. 1987) (*en banc*) (assessment for the entire costs of litigation on appeal is appropriate where the entire appeal is frivolous). There was no need for the district court to specify the excess costs attributable to any particular act, as Petitioner Sheehan contends, for the whole case was unwarranted from its inception.

IV. THERE IS NO CONFLICT BETWEEN THE DISTRICT COURT'S SUMMARY JUDGMENT AND SANCTIONS ORDERS

The final ground asserted by Petitioner Sheehan for this Court granting him certiorari—that "it is impossible to reconcile" the summary judgment order with the sanctions orders (Sheehan Pet. 30) is meritless. The summary judgment order found that petitioners had no admissible evidence on the issue of causation.[12] 691 F. Supp. 1357

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[11] Petitioner Sheehan contends that § 1927 sanctions based on his resistance to disclosing the unidentified sources would be "clear error." (Sheehan Pet. 27, n.10.) However, the district court did not base its sanctions order on Mr. Sheehan's resistance to disclosure but on the fact that he litigated disclosure knowing that many of the unidentified sources were dead or nonexistent.

[12] Petitioner Sheehan's contention that the district court acknowledged that plaintiffs' "evidence 'may establish' certain critical 'issues of fact'" (Sheehan Pet. 30) is wrong. The district court stated that plaintiffs' showing "may establish issues of fact concerning" only certain enumerated evidence, all incidental in nature. 691 F. Supp. at 1375 (J. App. I, 24.36-A). The district court then

(S.D. Fla. 1988) (J. App. I, 24-A). The sanctions orders found the same. 705 F. Supp. at 1545 (J. App. I, 31-A, 33-A). The additional finding of the sanctions orders that the Sheehan Affidavit was false creates no conflict with the summary judgment order.

V. THE IMPOSITION OF RULE 11 SANCTIONS ON THE CHRISTIC INSTITUTE—A REAL PARTY IN INTEREST IN THIS CASE—IS NOT CONTRARY TO THIS COURT'S DECISION IN *PAVELIC & LEFLORE*

The district court held, and a unanimous panel of the Eleventh Circuit agreed, that Rule 11 sanctions against the Christic Institute are warranted. This ruling is not in conflict with this Court's decision in *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989). The mandatory sanction of Rule 11 extends to two categories: "the person who signed [the paper], a represented party, or both." Fed. R. Civ. P. 11. *Pavelic & LeFlore* considered only the first category and held that the law firm of the attorney who signed the sanctionable paper cannot be sanctioned as "the person who signed [the paper]." It did not consider, much less decide, whether a "law firm" that is in fact a represented party, as is the case here, may be sanctioned under Rule 11.

In a very literal sense, the Christic Institute (not plaintiffs) was always the real party in interest in this litigation, under the direction of its chief counsel, Mr. Sheehan. The Christic Institute's fund-raising material made this point clear. For example, the Christic Institute characterized Tony Avirgan as the "plaintiff in the Christic Institute lawsuit." (R37.1178 Ex. I.) Elsewhere, it announced:

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went on to hold that plaintiffs made no showing on facts necessary to establish causation: "[T]hey make no showing [that] Hansen was the defendant Galil or that Hansen or Galil were associated with the enterprise, or worked with the enterprise, or were paid by the enterprise, or any of the defendants." *Id.*

"Christic Institute Presents Jackson Browne and Band: A Benefit Concert for the La Penca Lawsuit, and the Christic Institute's Contragate Project." (2SR4.1348 Ex. C.) And Mr. Sheehan, in one of his many fund-raising speeches on behalf of the Christic Institute, stated: "Well, we were quite distressed by this and we felt that we should hurry up and find ourselves a client, since we are an organization that is tax exempt, a public interest organization like the American Civil Liberties Union or the NAACP. We are allowed to engage in fomenting litigating." (R37.1218 Ex. F at 27.)

Moreover, the Christic Institute paid plaintiffs Avirgan and Honey for the use of their names, as discussed below in Point IX. The plaintiffs recognized that this suit was indeed the product of the Christic Institute and indicated their "faith" in the truthfulness of the Christic Institute's allegations, many of which were unknown to them. (2SR4.1348 Ex. D.) In addition, the Christic "Institute's name appears on all or most of the plaintiffs' filings." 125 F.R.D. at 190 (J. App. I, 51-A). Further, responses to document requests and answers to interrogatories,[13] including answers that perpetuated the falsehoods of the Sheehan Affidavit, were executed by attorneys on behalf of the Christic Institute and served without any verification by the plaintiffs.[14] Finally, this litigation achieved its massive proportions as a direct and calculated result of the formidable fund-raising efforts of the Christic Institute. Under these circumstances, *Pavelic & LeFlore*'s

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[13] Fed. R. Civ. P. 33 provides that interrogatories are "to be answered by the *party* served . . . answers are to be signed by the person making them, and the objections signed by the attorney making them." (Emphasis added.)

[14] For example, in one early set of answers, the Christic Institute identified Colonel Barrantes as a person with knowledge but refused to identify source 38 of the Sheehan Affidavit because of its "good faith belief that such disclosure would put the health and safety of such person at great risk." (R16.595 Ex. C, pp. 4-9.) Subsequent, court-compelled disclosure showed source 38 to be the same Colonel Barrantes. (R14.529.)

ruling regarding the responsibility of a traditional law partnership is simply inapposite, and there is no conflict between that case and the holding here.

Even if the Eleventh Circuit erred in affirming Rule 11 sanctions against the Christic Institute after this Court's decision in *Pavelic & LeFlore*, certiorari is not warranted for two reasons. First, few, if any, cases will present situations where law firms have engaged in conduct such as that of the Christic Institute. Second, reversal on the Rule 11 sanctions would not change the result. The entire amount of the sanctions was imposed on the Christic Institute "coextensively" under Rule 11 and the district court's inherent powers to sanction bad-faith conduct. 705 F. Supp. at 1549, n. 5 (J. App. I, 42-A). As discussed below in Point VII, a unanimous panel of the Eleventh Circuit found that the district court did not abuse its discretion in imposing bad-faith sanctions on the Christic Institute. The sanctions, therefore, are supportable on an independent ground.

VI. THE DISTRICT COURT'S IMPOSITION OF § 1927 SANCTIONS UPON THE CHRISTIC INSTITUTE DOES NOT MERIT REVIEW BY THIS COURT

Respondents do not maintain that the Christic Institute may be sanctioned under 28 U.S.C. § 1927.

Nevertheless, the district court's entry of § 1927 sanctions against the Institute does not warrant the exercise of this Court's review for several reasons. First, the plain language of § 1927 creates no ambiguity requiring resolution by this Court. By its terms, § 1927 applies only to attorneys. Sanctioning of a non-attorney under § 1927 is thus not likely to be repeated. Second, contrary to Petitioner Christic's contention (Christic Pet. 9), there is no conflict on this issue between the Fourth and Tenth Circuits. *Blue v. U.S. Dept. of Army* considered the issue of § 1927 sanctions against law firms only in dicta. 914

F.2d 525, 549 (4th Cir. 1990). *Glass v. Pfeffer* did not even involve § 1927, but rather the district court's inherent power to sanction bad-faith conduct. 849 F.2d 1261 (10th Cir. 1988). Third, reversal of the imposition of § 1927 sanctions against the Christic Institute would not change the result in this case. As explained above, the entire amount of the sanctions was also imposed under Rule 11 and the bad-faith exception, each of which independently supports the sanctions against the Christic Institute.

VII. THE DISTRICT COURT'S IMPOSITION OF BAD-FAITH SANCTIONS ON THE CHRISTIC INSTITUTE IS NOT CONTRARY TO *PAVELIC & LEFLORE*

Petitioner Christic contends that the bad-faith sanctions imposed upon it pursuant to the district court's inherent power are contrary to this Court's decision in *Pavelic & LeFlore* and reflect a conflict among the circuits. (Christic Pet. 9, 11-14.) This contention is meritless.

Pavelic & LeFlore did not address, much less determine, the scope of a district court's inherent power to sanction bad-faith conduct. Rather, *Pavelic & LeFlore* considered only the scope of Rule 11 sanctions. Its ruling that a law firm is not subject to Rule 11 sanctions is based on a textual interpretation of a written rule that sets forth with "extreme care" the persons who must be sanctioned for violation of Rule 11. 110 S. Ct. at 459. *Pavelic & LeFlore*'s textual interpretation of Rule 11 cannot be read to circumscribe a district court's exercise of its inherent power to sanction the bad-faith conduct of those who appear before it—whether they be litigants, attorneys or law firms. This Court's subsequent decision in *Chambers v. NASCO* supports this view. 111 S. Ct. 2123 (1991). *Chambers* recognized the fundamental difference between sanctions imposed under statutes and rules and those imposed under a district court's inherent power.

> We discern no basis for holding that the sanctioning scheme of the statute and the rules displace the inherent power to impose sanctions for the bad-faith conduct described above. These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions. First, whereas each of the other mechanisms reaches only certain individuals or conduct, the inherent power extends to a full range of litigating abuses. At the very least, the inherent power must continue to exist to fill in the interstices. Even the dissent so concedes.

111 S. Ct. at 2134.

The Eleventh Circuit's affirmance of bad-faith sanctions against the Christic Institute—even if viewed only as the law firm of plaintiffs' counsel rather than a real party in interest—is in accord with a Tenth Circuit decision upholding bad-faith sanctions against a law firm. *See Glass v. Pfeffer*, 849 F.2d 1261 (10th Cir. 1988). Petitioner Christic relies on the Fourth Circuit's decision in *Blue v. U.S. Dept. of Army*, 914 F.2d 525 (4th Cir. 1990), to suggest that there is a conflict in the circuits on this issue. (Christic Pet. 9.) However, the Fourth Circuit in *Blue* specifically declined to determine whether a law firm is subject to sanction under the district court's inherent power:

> Because there is no basis in this record upon which to sanction the law firm, we need not address the question whether a law firm can ever be sanctioned under the theories [including inherent power] invoked by the district court.

914 F.2d at 549. The Fourth Circuit's failure to decide when a law firm may be sanctioned is no ground for concluding that there is a split in the circuits.

VIII. THE ENTRY OF SANCTIONS AGAINST THE CHRISTIC INSTITUTE COMPLIED FULLY WITH DUE PROCESS REQUIREMENTS

The Christic Institute argues in Point III of its petition that "[t]he district court's failure to hold a hearing of any sort prior to assessing a huge punitive sanction and the panel's affirmance thereof is error of constitutional moment." (Christic Pet. 17.) That argument is meritless.

A. The Christic Institute Waived An Evidentiary Hearing

The Christic Institute waived any right it had to an evidentiary hearing when, like Mr. Sheehan, it failed to request a hearing as required by Local Rule 10.B.1. *See*, Point II, *supra*. Furthermore, as noted above, the Christic Institute received a fully adequate opportunity to make written submissions on the sanctions issue.

B. The District Court's Findings Were Sufficiently Specific

The district court's findings were sufficiently specific to comport with this Court's ruling in *Chambers*. As discussed above in Point V, the Christic Institute was a law firm in search of a plaintiff. Its goals were not the judicial resolution of a valid claim but rather exploitation of the subpoena power of the federal courts to conduct its own Iran/Contra investigation and to enhance its revenue-raising capabilities.[15] Against this backdrop, the district court found that the Christic Institute was so eager to launch its own Iran/Contra investigation that, in the name of its paid plaintiffs, it brought this suit based only upon "unsubstantiated rumor and speculation from unidentified sources with no first hand knowledge." 705

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[15] Petitioners described their lawsuit as the "legal equivalent of a federal criminal grand jury investigation." (R6.263.4 n.1 and attachment.)

F. Supp. at 1545 (J. App. I, 33-A). Accordingly, the district court found that the Christic Institute's attorneys "must have known prior to suing that they had no competent evidence to substantiate the theories alleged in their complaint." *Id.* at 1545 (J. App. I, 32-A). As the district court further found, the Christic Institute's conduct constituted an "abuse of the judicial process." *Id.* at 1545 (J. App. I, 33-A).

IX. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING BAD-FAITH SANCTIONS ON PLAINTIFFS AVIRGAN AND HONEY

Petitioners Avirgan and Honey have presented no reason for this Court to review the district court's imposition of bad-faith sanctions on them. The district court's decision is not at odds with any decision of this Court. To the contrary, this Court's recent decision in *Chambers* upheld bad-faith sanctions in the entire amount of the defendant's attorney's fees—almost $1 million—against a non-lawyer plaintiff such as Avirgan and Honey. 111 S. Ct. 2123.[16] Likewise, Petitioners Avirgan and Honey have not suggested, much less demonstrated, any conflict in the circuit courts on the issue of whether lay clients are subject to bad-faith sanctions. Like the Sheehan and Christic petitions, the petition of Avirgan and Honey merely asks this Court to engage in a fact-specific determination of whether the district court abused its discretion in imposing bad-faith sanctions against them.

In any case, review of the sanctions orders and the record below demonstrates that the district court did not abuse its discretion in sanctioning Mr. Avirgan and Ms. Honey. This is not the typical case where the client pays

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[16] *Chambers* followed prior decisions of this court upholding bad-faith sanctions against litigants. *See, e.g., Roadway Express Inc. v. Piper*, 447 U.S. 752, 766 (1980) (reasoning that attorneys are subject to bad-faith sanctions precisely because litigants are).

for litigation or even receives free services. Rather, as found by the district court, these plaintiffs were paid by the Christic Institute "approximately $50,000 for consultation, public speaking, and trips from Costa Rica to the United States." 125 F.R.D. at 190 (J. App. I, 51-A).

Nor is this the typical case of a client merely relying on its attorneys and passively waiting for a result. Avirgan and Honey are as responsible as Sheehan and the Christic Institute for filing a baseless complaint. By the time the complaint was filed, Avirgan and Honey had conducted an investigation and written a report on the La Penca bombing. (Avirgan & Honey Pet. 3.) That investigation produced no witnesses who could show that any of the defendants were responsible for the La Penca bombing.[17] The failure of their own investigation to produce even one such witness should have alerted plaintiffs to the baselessness of the allegations of Sheehan and the Christic Institute when the latter recruited them to be plaintiffs.[18] As the district court found, "plaintiffs 'had every reason to know they stood no chance of proving' that the defendants were responsible for the injuries to Tony Avirgan." 705 F. Supp. at 1545 (J. App. I, 33-A).

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[17] The district court specifically found that "[a]fter two years of protracted and extensive discovery of scores of witnesses across the United States, Costa Rica, and elsewhere, the plaintiffs were unable to produce a single witness who could state that the defendants exploded the bomb or were responsible for the assassination attempt." 705 F. Supp. at 1545 (J. App. I, 31-A). *A fortiori*, they had no such evidence when they concluded their investigation or when they filed their complaint.

[18] The outcome of John Hull's criminal libel suit against Petitioners Avirgan and Honey has no bearing on the sanctions issue here. Even the garbled and uncertified translation that petitioners submitted to the district court (R3.103) shows that the Costa Rican judgment in no way validated the Avirgan-Honey investigation so that Avirgan or Honey could rely on its conclusions. All the court held was that Avirgan and Honey lacked the necessary intent to injure required to sustain the criminal charges. *Id.*

Moreover, the complaint to which Petitioners Avirgan and Honey sold their names went far beyond anything related to their investigation of the La Penca bombing. The complaint alleged a thirty-year conspiracy spanning four continents. Mr. Avirgan and Ms. Honey admitted at their depositions that they had no knowledge of any basis for the allegations in the complaint against many respondents, such as Shackley and Singlaub. (*See, e.g.*, R45.1202.98; R45.1202.112; R45.1202.288-90; R45.1202.93-94.) Such reckless disregard for the factual basis of a complaint filed in their names constitutes bad faith. Avirgan and Honey were witting and compensated participants in a groundless lawsuit that cost the respondents large sums of money, a significant amount of time that can never be recovered, and a great deal of anguish. They cannot avoid the consequences of their recklessness by hiding behind their attorneys.

Likewise, the continued participation of Petitioners Avirgan and Honey in this case constituted bad faith. Their contention that the case "proceeded with little or no involvement of the plaintiffs" except attendance at their own depositions and answering interrogatories (Avirgan & Honey Pet. 4) is belied by the facts. First, Petitioners Avirgan and Honey continued their investigation long after they wrote their report and met Mr. Sheehan. (*Id.* at 9.) Their own continued failure to unearth any competent evidence that the respondents caused the La Penca bombing should have alerted them to the groundlessness of the suit. Second, they met frequently with Christic Institute attorneys in the United States and Costa Rica and engaged in fund-raising for the litigation, activities for which they were compensated by the Institute. 125 F.R.D. at 190 (J. App. I, 51-A). Their continued assistance gave knowing support to Mr. Sheehan's conduct, which the lower courts found clearly sanctionable.

As the foregoing demonstrates, the district court's imposition of bad-faith sanctions against Petitioners Avirgan and Honey does not conflict with any decision of this Court, creates no conflict among the courts of appeals, and does not constitute an abuse of discretion.

CONCLUSION

For the foregoing reasons, the petitions of Mr. Sheehan, the Christic Institute, and plaintiffs Avirgan and Honey for writs of certiorari should each be denied.

Respectfully submitted,

JACK MCKAY
(Counsel of Record)
JANE M. SULLIVAN
SHAW, PITTMAN, POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8439
Attorneys for Respondent
Theodore G. Shackley

THOMAS R. SPENCER
SAMUEL B. REINER, II
SPENCER & KLEIN, P.A.
801 Brickell Ave., Suite 1901
Miami, Florida 33131
(305) 374-7700
Attorneys for Respondent
John K. Singlaub

MICHAEL W. BURNBAUM
4820 Southeast Financial Center
200 So. Biscayne Boulevard
Miami, Florida 33131
(305) 379-4050
Attorney for Respondent
Rafael Quintero

THOMAS HYLDEN
BAKER & HOSTETLER
Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1640
Attorney for Respondent
Robert Owen

PAUL V. CASTELLITO
SHARP & LANKFORD
1785 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 745-1700
Attorney for Respondents
Thomas Clines, Albert Hakim,
Rafael Quintero and
Richard Secord

EDWIN R. SMITH
1004 Hulman Building
Evansville, Indiana 47708
(812) 425-5137
Attorney for Respondent
John Hull

THEODORE KLEIN
FINE, JACOBSON, SCHWARTZ,
NASH, BLOCK & ENGLAND
100 S.E. 2d Street
Miami, Florida 33131
(305) 577-4050
Attorney for Respondents Ronald Martin, James McCoy and Mario Delamico

LUIS S. KONSKI
STEWART, DAMSKY, MARKUS
& KONSKI
1395 Brickell Ave.
Third Floor
Miami, Florida 33131
(305) 358-7272
Attorney for Respondent Moises Nunez Ruiz

J. MICHAEL FITZGERALD
FITZGERALD & PORTUONDO
2701 Museum Tower
150 West Flagler Street
Miami, Florida 33130
(305) 358-0737
Attorney for Respondent Adolfo Calero

H. JEFF CUTLER
DE LA CRUZ & CUTLER, P.A.
241 Sevilla Ave., Suite 805
Coral Gables, Florida 33134
(305) 446-0100
Attorney for Respondent Jorge Gonzalez